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ABSTRACT

Some might perceive a contradiction-in-terms in the claim that an appointment to the United States Supreme Court demands, or even permits, a political campaign. However, where there is a choice--a judgment identifying the preference for one proposition, or one person, over another--there is politics, there is rhetoric, and there is an ethical dimension. When such a choice demands the exercise of collective action by numbers of people, reasons must be offered--good, bad, or indifferent; past performance must and will be investigated; and predictions of capabilities and future performance must be made. Such was the case when President Ronald Reagan nominated Robert H. Bork to the Supreme Court. Several factors must come into consideration in an analysis of the campaign communications that occurred during Bork's confirmation hearings. Whether rejection or confirmation can be based on judicial philosophy or solely on ethics and competence; at what point the politicization of judicial nominees occurs; and how individual senators determined they would vote are all elements that need to be evaluated. With the acceptance of the notion that neither presidential nomination nor United States Senate consent is without political appraisal of the judicial philosophy of the nominee, the American public will gain the political maturity to realize that in every choice there is rhetoric, ethics, and politics. (Twenty-eight notes are included.) (MS)

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A POLITICAL CAMPAIGN FOR SUPREME COURT APPOINTMENT: THE CASE OF ROBERT BORK

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Just before Independence Day, 1987, Mr. Justice Lewis F. Powell, Jr., told Chief Justice William Rehnquist that he intended to retire. Mr. Justice Powell had served on the Supreme Court for fifteen years and had come to be known as the "swing vote," especially in abortion and civil rights cases. His replacement - given Ronald Reagan's appointments of Associate Justice Sandra Day O'Connor, of William Rehnquist to replace Warren Burger as Chief Justice, and most recently, of Associate Justice Anton Scalia - was seen as the person who could really usher in a "Rehnquist Court" - a court that would reliably reflect the Reagan conservative bias. That expectation was as dearly sought by Reagan's followers as it was deeply feared by his opponents.

Through his tenure, Justice Powell, who had been appointed by Richard Nixon as a part of his "Southern strategy," had proven to be more moderate than conservative. A highly political scene was set by the prospect of a litmus-tested conservative replacement, facing "advice and consent" by a Senate Judiciary Committee with a Democratic majority, chaired by a pre-primary candidate for the Democratic presidential nomination, all of this to be played out in the shadow of the Iran-Contra hearings. "Politics is the art of the possible," the old bromide holds. Discovery of what was, in this case, possible, and how to make it so, was the political challenge for the Reagan administration.

Some might perceive a contradiction-in-terms in the claim that an appointment to that single non-elected body at the top of our national judiciary demands, or even permits a political campaign. I submit that wherever there is choice - a judgment identifying the preference for one proposition, or one person, over another - there is politics, there is rhetoric, and there is an ethical dimension. When such a choice demands the exercise of collective action by numbers of people, reasons must be offered - good, bad, or indifferent; past performance must and will be investigated and predictions of capabilities and future performance must be made. Such was the case when Ronald Reagan nominated Robert H. Bork to the United States Supreme Court, to take the seat vacated by Justice Powell. A look at some of the campaign communication will reveal the charges and countercharges, and enable an evaluation of some of the choices made during the campaign.

Philosophy or Competence: That is the Question

In 1974, Rick Vatz and Ted Windt argued that there are three "conventional grounds for announcing opposition to a Supreme Court nominee; philosophy, ethics, and competence." Of these they contended that "[o]pposition on the basis of judicial philosophy is usually insufficient to defeat a nominee," because such opposition to "political beliefs is, symbolically, to deny him his right to hold such beliefs or to say that his beliefs make him unfit for public office." Further, they held that "to question a nominee extensively about his politics and then to make that the cause for rejection implies to many the undermining of two vital principles of the American system: the right to hold dissenting opinions and the myth that 'justice is blind.'" Their conclusion was that public ethics and judicial competence were the only really available options for opposition because philosophical opposition demanded that one "demonstrate that the nominee's beliefs are so extreme that he could not render justice fairly."[1]

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Only ten years later, among the concerns emphasized in Ronald Reagan's 1984 campaign for reelection was his philosophical "battle for control of the judiciary." Reversing the view that "beliefs make him unfit for public office," President Reagan - much as others had before him - chose his nominees according to the criterion that only certain views would make one fit for the office of Judge or Justice. During his first four years in office, largely because of the increase in the size of the federal court judiciary, Ronald Reagan had appointed a considerable number of "litmus-tested" judges, almost all of whom had been confirmed with little or no dispute by the Senate. Indeed, George Will affirmed that "[b]y 1989 Reagan will have appointed 45 percent of all sitting federal judges."[2]

Still, given the lifetime tenure of Supreme Court Justices, Reagan had not gained the opportunity to put his philosophical stamp on that body. Certainly, his three previous choices had altered the composition of the Court. But here, at long last, came the chance to replace a swing-moderate with a dependable conservative. On the one hand, Reagan's record of acceptance had been excellent at all levels; on the other, the perceived risk of further change in the United States Supreme Court was patent, increasing the probability that the next candidate, whomsoever it might be, would face even more severe scrutiny than those who already had been confirmed.

It can be argued that each candidate should be appraised against the same standard, no matter who else is on the Court. Still, at some point, when a change of balance is imminent, standards for nomination will inevitably be altered. So, too,will be the standards for consent.

At that same point, opponents of an appointee must consider the possibility that rejection of the first choice nominee may lead to nomination of a less acceptable alternative. They must recall Richard Nixon's nomination of George Harrold Carswell on the heels of the Senate rejection of Clement F. Haynesworth, who had been rejected largely on the grounds that his insensitivity to conflicts of interest raised significant question concerning his standards of judicial ethics.[3] The Carswell nomination, in the words of Richard Harris, "meant that he [Nixon] was prepared to insult one branch of the government, the Senate, in order to lower the quality and lessen the integrity of a second branch, the Judiciary as symbolized by the Supreme Court, in order to give unequal power to the Executive - all for the purpose of bettering his own prospects of reelection."[4] Granted, Ronald Reagan faced no prospect of reelection. Still, he had hopes of projecting his "Reagan Revolution" far beyond his own tenure in office, and there was at least the theoretical possibility that he might risk nomination of a mediocre candidate on the assumption that the Senate wouldn't reject him twice in a row. All that the opposition Senators could hope was that Reagan advisors would recall the Haynesworth-Carswell saga, and avoid the same tactic only seventeen years later.

As the 1987 Senate Judiciary Committee hearings progressed, following the long delay in scheduling hearings, Newsweek reported that attention was shifting from the qualifications of the nominee, Judge Bork, and the witnesses testifying pro and con, to the four members of the Judiciary Committee who had not yet taken public positions on the nomination. Because a Washington Post - ABC opinion poll showed that, of those who were aware of the nomination (they offered no information concerning the percentage of those contacted who said they were aware) 48% opposed confirmation, while 44% supported Bork. Given this narrow margin, Senators Robert Byrd, Arlen Specter, Dennis DeConcini, and Howell Heflin were not under heavy public pressure in either direction. Each could postpone his decision, and continue his principled - not political -

endeavor of gathering information. Newsweek predicted a "Hobson's choice - between Bork and someone else just as conservative," if he were defeated. Still, it was noted that "[t]he president might run into trouble if he nominated another controversial scholar whose views were on the record and ready to be combed through, as Bork's have been."[5]

On another level, because Robert Bork was the third candidate to be nominated by Ronald Reagan, some Senators might assume that he had used up his top two choices, and that there was reason to scrutinize Bork, who, after all, was well known in Washington. It had been only some five years since his approval as Judge of the Fifth Circuit Court of Appeals. Perhaps more important, most Senators were aware that Bork had made his contribution to the Watergate "Saturday Night Massacre" by firing Archibald Cox. And most recently, Bork's name had been among those mentioned at the time his Fifth District colleague, Anton Scalia, was nominated. Donald Regan, Ronald Reagan's Chief of Staff, noted in passing, in his book For the Record, that Scalia had been preferred over Bork to replace Rehnquist as Associate Justice, because Bork was acknowledged by White House advisors to be the more political and controversial of the two.[6] In any event, the Reagan people recognized that the game was political, and they called on the services of a highly experienced "former Senate aide turned corporate lobbyist" named Tom Korologos to guide Robert Bork through the confirmation processes,[7] but not before the opposition had laid claim to the view that Bork was unacceptable because of his views on freedom of speech, civil rights, abortion, and antitrust enforcement. It was Korologos who became responsible for implementing the White House strategy of portraying Judge Bork, despite what he had written, and in the face of opposition claims, as "a mainstream jurist,"[8] and/or as "a moderate jurist and natural successor to retiring Justice Lewis F. Powell, Jr., the high court's principal centrist."[9]

This "mainstream" theme has continued to be a political staple of the Reagan administration, becoming a repeated refrain in the campaign rhetoric of George Bush as he painted Michael Dukakis as a "Massachusetts liberal" and a "card-carrying member of the ACLU." This was to claim that he was "outside of mainstream American values" and a candidate whose aim was not to preserve and promote the "Reagan Revolution," but to destroy it.

One characteristic of Judge Robert Bork made the politics of his confirmation significantly different from that of Harrold Carswell, the Nixon nominee, and also different from that of Daniel Manion, the 1986 Reagan nominee for Judge of the Seventh Circuit Court of Appeals in Chicago. This was the characteristic of competence. Carswell had been cited by his own Fifth District colleagues, as well as by others, as "a mediocre judge." (It was of Judge Carswell, it should be recalled, that Senator Roman Hruska said, in a moment of near-complete frustration, "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there."[10]) An inordinate number of Carswell's opinions - some 600 out of 1500 -had been reversed on appeal. Only 6 of the 67 Fifth Circuit judges had a worse record.[11] A parenthetic, probably political, note that might be mentioned here is that the member of the United States Attorney General's staff "who had been responsible for screening Carswell's legal record before he was nominated" was then-Assistant Attorney General for Legal Counsel, William H. Rehnquist.[12]

In the 1986 case of Daniel Manion, who had no prior judicial record when he was nominated by Ronald Reagan to the Seventh Judicial District bench, numbers of his attorney colleagues pointed to his "badly edited and at times

sloppily written legal briefs" and concluded that he was "stupid."[13] Again, noting political implications, it was the junior Senator from Indiana, J. Danforth Quayle, who led the successful fight for Dan Manion's confirmation. Perhaps it is reassuring to note that, after two years on the bench, Dan Manion is now seen as a "middle of the pack" judge, neither brilliant nor stupid.[14]

No such claim of incompetence was levelled at Robert Bork. Even his harshest critics credited him with having "blue chip credentials..." They said, "he is a brilliant legal theorist, a distinguished appellate judge and a charming if sometimes arrogant man..."[15] Opposition to Bork was mounted against his ideology, his legal philosophy. True, Carswell had been an avowed and published racist, in addition to being mediocre. And apart from the question of Dan Manion's own ineptitude, his father, Clarence, was one of the founders of the John Birch Society. It was claimed that Bork's most obvious weakness, in addition to objections to positions he had espoused, was that he had written at great length, and with demonstrable consistency. It was easy to discover where he stood, and difficult for him to claim that he had changed his philosophical postures through the years. All one had to do was to take the time to read - still, we must acknowledge that this is asking a great deal of most people whose opportunity it is to vote in political campaigns. But the first phase of the confirmation campaign was not for the votes of the general electorate, it was for the affirmative votes of members of the Senate Judicial Affairs Subcommittee - consisting entirely of attorneys. Not only were they in a position to evaluate competence, they could hardly misjudge the legal philosophy expressed in law review articles, briefs, and judicial opinions.

It is unusual to demand that political campaign communication somehow provide a definition of "competence." Those who vote seldom have a very clear "job description" of what will be expected of candidates, once they attain office. Frequently candidates have had no direct experience in positions similar to that for which they campaign. In most instances,the voters have only their own conception of what to look for, and how to evaluate what they see. The politics of judicial nomination is much more focused. In this instance, some of the Senators would choose to evaluate "judicial competence" according to the preponderance of letters from constituents, or other demonstrably irrelevant criteria. Others would evaluate the briefs, the decisions and the reversal records and the law review writings of the nominee. Such writings unquestionably relate to the responsibilities of Supreme Court Justices, who must appraise relevant evidence, arrive at a decision, and state that decision and support it in writing.

The politics of confirmation in 1988, then, differ from those of 1970. They differ, too, from those of the most protracted confirmation battle of all time - the 1916 hearings on the confirmation of Louis Dembitz Brandeis. On January 28, 1916, twenty-six days after the death of Justice Joseph Lamar, Brandeis's name was sent to the Senate by President Woodrow Wilson. The next-day's headline in the New York Sun declared "SELECTION DECLARED TO BE BASED ON POLITICAL MOTIVES." On May 24 - after fifteen full weeks of Judiciary Committee consideration, Brandeis's confirmation was supported by a party-line vote of ten to eight. The vote of the full Senate on June 1 consented to Wilson's nomination by a margin of forty-seven to twenty-two. Brandeis's "judicial temperament" was questioned. (Brandeis had practiced with notable success before the Supreme Court, and had written perhaps more widely than Judge Bork, but had no prior experience as a judge.) Much of his writing had been in the popular press, supporting legislation or regulation at state or federal levels. Opposition to his nomination included many of America's "rich and famous," including former President William Howard Taft, who sought the nomination for

himself. Taft set a pattern when he sought opposition letters from other past presidents of the American Bar Association, and from Law School Deans. Brandeis followed precedent by not testifying before the Senate Judiciary Committee, though he did provide, through an intermediary, information and advice to support his cause. The fact that Brandeis was the first Jew to be nominated to the Court was alternately cited and denied as a significant factor in the battle. In the end, opponents found it impossible to support their cause in large part because they overplayed their hand, and because Brandeis countered their assumptions and conclusions with a body of facts that directly refuted their claims. His skill in exerting social influence - was more than a match for his detractors. His philosophy, when honestly represented, proved to be attractive to a wide range of Senators, who finally supported the nomination by a margin of just over two to one.[16]

When does Politicization of Judicial Nominees Occur?

As a Presidential candidate campaigns for his own election by contending that if his opponent is elected, there is an actuarial possibility that he could control the Supreme Court through the appointment of justices who would reflect his bias, the nation is put on notice that judicial philosophy will be the dominant criterion for nomination. Ronald Reagan had argued against Roe v. Wade, and declared that his nominees to federal judgeships at all levels would be carefully screened for a conservative bias. Once elected, he had done his best to make good on this campaign promise. With a Republican majority in the Senate, nominees were routinely approved. Even when the off-year elections returned a 54-46 Democratic majority, nominees for the lower federal courts faced little effective opposition.

The United States Supreme Court is an identifiably different institution. As George Will observed,

> The Court, more than any other American institution, depends, for its authority, on the perception of it as a place where principle reigns. Judicial review is somewhat anomalous in a system of popular government, and its legitimacy depends on the belief that those who exercise it do so only as construers of the text and structure of a document that allocates powers primarily to other institutions. That belief cannot withstand a selection process that suggests that Justices somehow represent this or that group interest.[17]

In the face of this view of the Supreme Court, New York University Law Professor Ronald Dworkin concluded that because Ronald Reagan had said that Judge Bork "'shares my view' of the proper role of the Court," "[t]he Bork nomination is the climactic stage of a very different presidential ambition: to freeze that institution, for as long as possible, into an orthodoxy of the president's own design."[18]

George Will's perspective is that which was accepted by Vatz and Windt - philosophy is not a proper criterion for evaluation when considering an appointment to the Court. It is, as has been repeatedly seen, at odds with experience. The reality is that politicization of the judicial nomination process begins during the presidential primaries, and its direction is set as the election results are ascertained. It is then that one can see the philosophical preference of the President, who nominates, and the Senate, which consents, and perhaps even get a sense of how much effort might be expended, and by whom, to generate public pressures on those members of the Senate who are most inclined to vote constituent pressures, rather than personal judgment.

Transmission of the nomination to the Senate simply initiates a shift of intensity and focus in the politics of judicial choice. As previously noted, Bork's "campaign manager," Tom Korogolos, was named very shortly after his name

was forwarded. It was not, of course, soon enough to head off the build-up of anti-Bork sentiment, which had been building since his earlier nomination to the Federal judiciary. Indeed, it is reported that the Leadership Conference on Civil Rights - a coalition of 185 organizations supporting liberal causes - had waged a continuous, six year effort to defeat any and all Reagan nominees. The first anti-Bork strategy session of this group was held on the day Justice Powell announced his resignation - June 26, five days before the nomination was sent to the Senate. The day before Bork's nomination, Ralph Nader's "Public Citizen" group ran a computer search for all of his cases. Within the month following the nomination, Norman Lear's People for the American Way had initiated its first phase of opposition, beginning the work of raising $2 million and placing full page newspaper ads and radio spots urging the Senators to take their "advise and consent" role seriously by considering Judge Bork's judicial philosophy as well as his other qualifications. Planned Parenthood, the Southern Christian Leadership Conference, the ACLU, and other national organizations were also active in raising money for the anti-Bork campaign, and in spreading the word to everyone on their mailing lists that they opposed the nomination on philosophical grounds. Most of the direct mail and telephone contacts combined a request for donations with a suggestion that the recipient contact her/his Senator, urging a negative vote on Judge Bork. These contacts were carried out during the seventy-day time lag between nomination and the beginning of the Senate Judiciary Committee hearings.[19]

In September, as the hearings progressed, another dimension was added to the direct appeal to the public. Under the sponsorship of People for the American Way, Gregory Peck appeared on a videotape, in which he said, among other things, "'He [Bork] defended poll taxes and literacy tests, which kept many Americans from voting....He doesn't believe the Constitution protects your rights to privacy. And he thinks freedom of speech doesn't apply to literature and art and music.'" In a highly interesting reprise on the Bork nomination, Allen Dodds Frank wrote in the January 25, 1988, Forbes magazine, that this was the "first time, a group of activists used showbiz and advertising techniques not to influence issues but to launch a character attack on a judicial nominee. By shrewdly targeting radio and TV commercials at blacks and blue-collar workers, Norman Lear's People for the American Way convinced many people that the scholarly judge was prejudiced against blacks and women." Frank asserted that "Peck was perilously close to lying, but never mind. Viewers wouldn't be familiar with Bork's actual record. And Peck was no ranting, angry activist. Here was a clean-cut hero, measuring his words and speaking with apparent deep feeling." Frank concluded that Lear "clearly knows how to get the attention of millions of ordinary people, and how to get inside their heads. His cunningly emotional campaign used the technique of the Big Lie, the more insidious because of its low-key delivery." What's more, on the last day that the commercials were run, the White House issued a statement branding them "patently outrageous and untrue." This, of course, made news, and brought the content of the commercials from CNN, where they had run, to the three networks and the newspapers.[20]

Paradoxically, the strongest thrust of the Frank article is his great disappointment that Ronald Reagan did little to fight back against this underhanded campaign by the liberal left. "Did Ronald Reagan fight back in kind?" Frank asked. "He did not, thanks to the timid counsel of the White House staff." Even more to be bewailed, Frank notes, was the fact that "conservative actors Charlton Heston and Clint Eastwood were eagerly awaiting a chance to speak up for Bork." "Heston, Eastwood and like-minded conservatives and middle-of-the-roaders in the entertainment industry wanted to film strong -

and equally emotional - commercials endorsing the judge. The green light never came." Heston is quoted as saying that "'Whoever was running things [in the White House] never put it together. The Administration didn't realize how committed the liberal establishment was to blocking Judge Bork's confirmation.'" But White House Deputy Press Secretary B. Jay Cooper observed that "'We never wanted to get into that kind of lobbying for the nomination, so we didn't. It would have further demeaned the process.'" Frank, in the manner of the true believer, didn't care about demeaning the process. He thought of how "it might have been" had Heston been permitted to film a version of a private letter he had sent to Senator Ted Kennedy (later released to Forbes), reading "'[Your] malevolent character assassination [of Bork] reeks of the worst excesses of the McCarthy era. I ask you to consider the value of decency, moderation and justice. Has it occurred to you that your life leaves you ill-qualified to pass judgment on another man's character.?'" Frank concludes that "Heston knew that Kennedy and Senate Judiciary Committee Chairman Joseph Biden (D-Del.) have both displayed character flaws where none could be pinned on Bork. Such an attack could have blunted their Bork-baiting. But the counterattack never came."[21]

By the close of the Judiciary Committee hearings, when there were still four members who had not declared which way they would vote, Judge Bork was reportedly upset over what he saw as inadequate White House support. The staff told him of a number of things that had been done, and things still being worked on. Thus braced, Judge Bork went back to Capitol Hill and offered to meet with any senator who felt doubtful. Senator Arlen Specter, the lone Republican who had not announced his decision, talked further with him, but emerged unconvinced that Judge Bork "was simply a misunderstood moderate, not the radical right-winger his foes alleged." Senator Specter concluded that "'In the final analysis, if I retained substantial doubt as to what Judge Bork would do on fundamental issues of constitutional law, I thought my obligation was to vote no,'" and he phoned Judge Bork with the bad news. Another of the undecided votes, Senator Howell Heflin, an Alabama Democrat, observed that his call from Ronald Reagan came very late in the game, and was ineffective because it had been linked with a rumor that a good friend was being considered for a federal appeals-court appointment. That put Heflin in a mood to say that it would be "terribly foolish" for the President to suggest bargaining for his vote. Conservative supporters of Judge Bork echoed Charlton Heston's complaint that the White House simply wasn't putting much into securing confirmation. They challenged the whole idea of trying to portray Judge Bork as a moderate. In the face of his writings, they observed, Bork was constantly on the defensive. Against the right-wing stances he had taken in some of his writings, it was impossible to argue successfully that he was a moderate - or, worse, that moderate positions he had expressed in the hearings were anything other than "death-bed conversions" in an attempt to gain confirmation.[22]

An intriguing line of thought was offered on the Senate floor just prior to the beginning of the Judiciary Committee hearings concerning the positions taken by Judge Bork in some of his law review articles. Senator Orrin Hatch (R-Utah), whose name had been among the four or five who might be nominated, chose to describe reactions of the committee of the American Bar Association as the result of an "'unprecedented ideological inquisition'" and "'vicious attacks'" on Judge Bork's record. The fifteen-man committee had divided, with 10 in favor, four opposed, and one neutral, on the motion to give Bork its "well qualified" rating - the highest rating available. This was the first time in eighteen years that such a committee had failed to provide a Supreme Court nominee with a unanimous endorsement. Ignoring that fact, and weakening

his own argument severely, Hatch commented that in the eleven years that he had observed the Bar Association ratings, "'I've seldom seen this without politics entering in.'" Senator Hatch charged that the four who voted against Bork were "willing to play politics," just like the Democratic Senators and liberal activist groups were doing. He argued that Judge Bork had an impeccable judicial record because none of the 400 decisions in which he had participated in his five years on the appeals bench had been reversed by the Supreme Court. Hatch then contended that much of what Judge Bork had written before he was confirmed to the bench should be largely ignored because, (a) some of those views expressed while he was a professor of law at Yale had later been modified, and he argued with equal enthusiasm, that (b) "'as a law professor he is paid to be provocative.'"[23] This latter contention might, if widely accepted, pave the way for a whole new genre of essays in the learned journals of academe.

The Vote

When the first round of tumult and shouting died down, and the Senate Judiciary Committee voted 9 to 5 against Judge Bork, each of the four who had withheld judgment until the testimony at the hearings was in voted with the majority. It was still barely conceivable that there would be some negative reactions from disgruntled voters. Dennis DeConcini, (D-Ariz) returned to his constituency over the weekend after casting his negative vote in order to assess reactions to his long-delayed decision. He already knew, of course, that more than half of the 25,000 pieces of mail that had come to his office had favored confirmation. He had seen the editorials in The Arizona Republic urging him to end his "political dithering." He knew, too, that party registration figures in Arizona showed a clear Republican majority, and that the state had not gone for a Democratic president since Harry Truman. On the other side of the line, Senator DeConcini knew that it was he who had first suggested the nomination of Justice Sandra Day O'Connor, and that he had waged a strong battle "against the liberals" to secure confirmation for William Rehnquist's appointment as Chief Justice. He acknowledged that some of the liberal Democrats, of whom he was not one, had played politics with Judge Bork's nomination. But he accused Ronald Reagan and some of the Republican senators of playing the same game. DeConcini's explanation of his ultimate decision was that after having participated in the hearings, "the testimony convinced him that the judge had 'a lack of understanding of the effect of judicial decisions on real people.'" Instead of caving in to pressures from the liberals, DeConcini noted that if political pressure had made his decision, he would have voted for confirmation, as his constituents had urged.[24]

Had the full Senate voted to reject the recommendation of the Judiciary Committee, charges of political maneuvering might have been more widespread, and might even have held some merit. As things worked out, Republicans Arlen Spector and Bob Packwood took firm stands against confirmation, with Packwood even saying things about leading a filibuster, if necessary. Hopes that Southern Senators might see echoes of Nixon's old "southern strategy" died aborning. Reelection in several of the southern states now demands at least some support from black voters. Judge Bork's continuing opposition to some of the "one-man-one-vote" and poll tax opinions would surely jeopardize those who affirmed his elevation to the high court.

The Washington-based Center for Media and Public Affairs applied content analysis techniques to all TV network news coverage and stories in the Washington Post to determine Judge Bork's image, as presented by the media. In general, they concluded that Bork was portrayed as "fit, but far right," despite administration efforts to present him as a part of the "judicial

mainstream." Eighty-one stories, containing 349 sources, showed Judge Bork in a positive mode as regards his judicial fitness. Three of four sources saw his conservatism as detrimental to his acceptance, and two of every three sources held that consideration of his judicial philosophy was relevant to the confirmation decision.[25]

This latter observation, that philosophy - positions taken concerning important issues - is an inescapable and a significant aspect of political campaign communication is important to campaign criticism. For a long time the concepts of "issue" and "image" have been theoretically separated to designate distinct perspectives for analysis and description. Rather recently, however, it has become commonplace to observe that political campaign messages contain little that can clearly qualify as "image messages." Much of what constitutes the "image" message falls in the domain of nonverbal communication, where the meaning of the "nonverbal language" rests much more in the perception and interpretation of the receiver than does verbal language.

Instead of spending much time in each campaign address saying the words, "I am competent," "I am mainstream America," candidates choose to dress and speak to look and to sound like an occupant of the offices they seek. Candidates state positions that are intended to convey the nonverbal message of "competence" and "mainstream America." They paint the opposition as extreme - whether right or left - so that, by inference, they take on the character or coloration of mainstream America. In this way, candidates meld the concepts of image and issue into their attempts to secure affirmation from those who vote in the election to political office, or in the confirmation for judicial office. Concern about image (i.e., character, values, bias, competence, or other concepts traditionally considered under the rubric of "ethos) significantly, if not completely, controls the individual's posture on each issue facing him. The position taken by Vatz and Windt, among many others, suggesting that opposition on the basis of philosophy can and should be rejected as grounds for rejecting the motion to confirm, is now seen as impractical, as well as misleading. As Alpheus T. Mason, the Princeton political scientist whose studies of Louis D. Brandeis place him among the finest judicial scholars, concludes,

> Constitutional theory usually reflects the training, and also the economic and social background of the judge himself. The judge does not and cannot live in a vacuum. He is, and ought to be, influenced by the life about him. The meaning of the Constitution, therefore, varies not only from age to age, but also from judge to judge, even though they sit on the same bench at the same time.[26]

Senator DeConcini's conclusion that Judge Bork had "a lack of understanding of the effect of judicial decisions on real people," and his earlier statement that "My feeling is, this guy is so intellectually enthralled through his whole life that I don't know how much common sense he has," [27] constitute an image-issue judgment rather than a conclusion about <u>either</u> image <u>or</u> issue - those inseparable dimensions of campaign communication.

In two recent speeches Mr. Justice Harry A. Blackmun has cited the real potential that his 1973 majority opinion in <u>Roe v. Wade</u> might well be overturned by the new Rehnquist Court - even during the present term of the Supreme Court. Beyond that, Blackmun has noted, the 1988 election could insure that "the Court could become very conservative, well into the 21st century." This statement by a sitting Justice may endanger "the public perception that justices stay above the political fray," but it does take note that <u>neither</u> presidential nomination <u>nor</u> Senate consent is without political appraisal of the judicial philosophy of the nominee.[28] In this acknowledgement, Mr. Justice

Blackmun credits the American public with the assumption of political maturity - with the ability to cope with reality. We, in turn, must demonstrate our ability to rise to his challenge and make our decisions in full recognition that in every choice there is rhetoric, and there is ethics, and there is politics. And - in Cronkhite's words - "That's the way it is!"

1. Richard E. Vatz and Theodore Otto Windt, Jr., "The Defeats of Judges Haynesworth and Carswell: Reelection of Supreme Court Nominee," Quarterly Journal of Speech, 60 (December, 1974), 478.

2. George F. Will, The New Season: A Spectator's Guide to the 1988 Election,(New York: Simon and Schuster, 1988), p. 194.

3. Vatz and Windt, "Defeats," QJS, 60, 480.

4. Richard Harris, Decision, (New York: E.P.Dutton & Co., 1971), p. 12.

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